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No. 84-1528

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

G. HUGH WAMBLE, *et al.*,
Cross-Appellants-Appellees,

v.

WILLIAM J. BENNETT, SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION, *et al.*,
Cross-Appellees.

and

G. HUGH WAMBLE and VERLINE COBBINS, *et al.*,
Cross-Appellants-Appellees,

v.

DEMPSTER and PAULINE FERGUSON, *et al.*,
Cross-Appellees.

On Cross-Appeal from the United States District Court for the Western District of Missouri

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MOTION TO DISMISS OR TO VACATE AND REMAND

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Cross-appellees Dempster and Pauline Ferguson, Eddie and Bernice Jimmons, Neal and Rose Plantz, Delores Snipes, Robert and Rebecca Torry, Leon and Rita Vanderfeltz, and Ralph and Hope Zapien hereby

move to dismiss or to vacate and remand this cross-appeal. The cross-appeal raises no issues that merit this Court's consideration beyond the question presented in *Ferguson v. Wamble*, No. 84-1343, and *Bennett v. Wamble*, No. 84-1355, the appeals corresponding to this cross-appeal.

OPINION BELOW

The opinion of the United States District Court for the Western District of Missouri is reported at 598 F. Supp. 1356 (1984) and is printed in the Appendix to the Jurisdictional Statement on Cross-Appeal (cited as "Cross-App. ——").

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a challenge under the Establishment Clause of the First Amendment to the constitutionality, as applied, of Chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 3801 *et seq.* (1982), amending and superseding Title I of the Elementary and Secondary Education Act of 1965, *as amended*, 20 U.S.C. §§ 2701 *et seq.* (1982). Pertinent portions of the First Amendment and the statute are printed in the Appendix to the Jurisdictional Statement on Cross-Appeal.

STATEMENT OF THE CASE

Cross-appellants' Statement of the Case distorts the findings of fact in the lower court's opinion and presents an exceedingly selective, biased, and misleading account of the evidence. Cross-appellees adopt and incorporate by reference the Statement of the Case in their Jurisdictional Statement in No. 84-1343, as

well as the Statement of the Case in the Jurisdictional Statement in No. 84-1355.

THE QUESTIONS PRESENTED OFFER NO MORE THAN POSSIBLE POINTS FOR AFFIRMANCE AND OTHERWISE DO NOT MERIT PLENARY REVIEW

The Jurisdictional Statement on Cross-Appeal is riddled with a misleading stream-of-consciousness patchwork of distorted recitations from the record and factual assertions lacking record support.[1] Some of the "Questions Presented" are not even addressed, and much of the argument has nothing to do with any of the "Questions Presented." Consequently, a complete response is neither possible nor meaningful. Nonetheless, it is apparent that the cross-appeal adds nothing to the principal appeals.

To the extent the cross-appeal attempts to raise arguments in support of the judgment below, those arguments should be made to support affirmance in the principal appeals and are not appropriate for cross-appeal.

A. Points for Affirmance Afford No Basis for a Cross-Appeal

The appellees in the main appeals, without cross-appealing, are "entitled under our precedents to urge any grounds which would lend support to the judgment below . . . ." *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 419 (1977). *See Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982).

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[1] It even comments, incorrectly, on the tone and demeanor of a witness's testimony. Jurisdictional Statement on Cross-Appeal at 15.

A prevailing party in a lower court would need to cross-appeal or cross-petition to change the judgment below. *See Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976); *Strunk v. United States*, 412 U.S. 434, 436 (1973); *Brennan v. Arnheim & Neely, Inc.*, 410 U.S. 512, 516 (1973). *NLRB v. International Van Lines*, 409 U.S. 48, 52 n.4 (1972); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381 n.4 (1970). However, the general rule is that a cross-appeal or cross-petition is not necessary to enable a party to advance any ground in support of the judgment in his favor. *See United States v. Arthur Young & Co.*, —— U.S. ——, 104 S. Ct. 1495, 1501 n.12 (1984); *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977); *Massachusetts Mutual Life Insurance Co. v. Ludwig*, 426 U.S. 479, 480-81 (1976); *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970).[2]

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[2] As this Court stated in *United States v. Raines*, 362 U.S. 17, 27 n.7 (1960):

> Since the judgment of the District Court awarded appellees all the relief they requested (despite rejecting most of their contentions, except the central one), no cross-appeal was necessary to bring these contentions before us if they can be considered otherwise. They would simply be alternative grounds on which the judgment below could be supported. In view of the broad nature of § 1252, which seems to indicate a desire of Congress that the whole case come up . . . we have the power to pass on these other questions, and since the District Court expressed its views on most of them, we also deem it appropriate to do so.

See Heckler v. Edwards, —— U.S. ——, 104 S. Ct. 1532, 1538 (1984).

B. The Questions Presented Are Improper for a Cross-Appeal

The "Questions Presented" for the cross-appeal are superfluous to the question presented in the main appeals or are too insubstantial to warrant plenary review.

1. *Primary Effect.* The first question is whether the Missouri Title I bypass program fails the "primary effect" test of constitutionality under *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The court below did not decide whether the Title I bypass program's primary effect advances or inhibits religion because it held there was a violation of the excessive entanglement element of the *Lemon* three-part test. (Cross-App. 21a-31a). Cross-appellants' primary effect contentions would do no more than support the judgment below and accordingly are not properly raised in a cross-appeal. Moreover, because the primary effect issue requires factual determinations, this Court may wish to remand it for further proceedings if it concludes that the primary effect issue should be addressed. *See Dandridge v. Williams*, *supra*, 397 U.S. at 476 n.6.

2. *On-Premises Program.* The second question adds nothing to the question presented in the principal appeals and is in some respects incomprehensible (*i.e.*, "when such services are provided on the premises of and at various locations physically and educationally identified with the parochial institutions").

3. *Injunctive Relief.* The cross-appeal asks whether declaratory and immediate injunctive relief should have been granted, but the district court *did* declare the Missouri Title I bypass program unconstitutional

and it *did* permanently enjoin the program. (Cross-App. 32a). That the district court stayed the injunction pending disposition of *Aguilar v. Felton*, Nos. 84-237, 84-238, and 84-239 (question of jurisdiction postponed to hearing on merits, Oct. 9, 1984), is not a predicate for a separate cross-appeal and is plainly too insubstantial for this Court to address. Indeed, if cross-appellants wanted to attack the district court's stay order, they should have exhausted their emergency appeal opportunities to the Court of Appeals for the Eighth Circuit and to this Court long before now.

4. *Unequal Treatment.* The only findings of unequal treatment in the court below related to the patently discriminatory manner in which private school children in Missouri were denied Title I services comparable to those that public school children received until the Title I bypass program was implemented. The statute requires that Title I services be provided to eligible students of public and private schools on an equal and equitable basis, 20 U.S.C. § 3806 (1982), and no substantial evidence was presented below to indicate any violation of that requirement after the bypass. The court below did not address any constitutional claims of unequal treatment.[3]

5. *Students' and Parents' Rights.* Cross-appellants' fifth question appears to rest on the contention that certain Missouri parents could secure Title I services for their children only by sending them to a private

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[3] Although not fully comprehensible from its abbreviated treatment in the cross-appellants' statement of jurisdiction, the charges of unequal treatment are sufficiently fact-bound that they should be addressed, if at all, in the first instance by remand to the district court.

church-affiliated school where Title I bypass instruction is provided. Aside from the lack of any finding below or, indeed, any evidence showing that any Missouri parent or child actually confronted this hypothetical, and aside from the statutory requirement of comparable Title I services for public and private school children, cross-appellants lack standing to raise this question. *E.g., Warth v. Seldin*, 422 U.S. 490, 499 (1975) (plaintiff "cannot rest his claim to relief on the legal rights or interests of third parties"). Once again, this question would not expand or modify the judgment below and is therefore improper for a cross-appeal.

6. *Contract Award.* The district court upheld the award of the Title I bypass contract to Blue Hills Homes Corporation. This decision upholding administrative action could be overturned only if clearly erroneous or an abuse of discretion and is not a substantial question for appeal. In any event, cross-appellants lack standing to challenge the award of the contract to Blue Hills. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

7. *Independent Contractor.* Cross-appellants' question about the possible sectarian appearance of an independent contractor is sheer makeweight. The district court found no constitutional defects in the nature of the independent contractor. (Cross-App. 16a-17a). The undisputed evidence at trial was that Blue Hills Homes Corporation was incorporated for a secular purpose: revitalization of older urban neighborhoods through housing renovation, crime prevention, education, mortgage and insurance reform, and community organization. In *Bradfield v. Roberts*,

175 U.S. 291, 297-99 (1899), this Court held that if an institution was incorporated for a secular purpose and operated in accordance with this secular purpose, the religious affiliation of the incorporators did not convert the institution into a religious organization. This principle has been recognized in recent decisions. *Roemer v. Board of Public Works*, 426 U.S. 736, 746 (1976); *Tilton v. Richardson*, 403 U.S. 672, 679 (1971). Cross-appellants' wish for an injunction assuring that contractors such as Blue Hills "be and appear to be free of sectarian influence" is the most farfetched of all.

Cross-appellees, appellants in No. 84-1343, rely on 28 U.S.C. § 1252 as the jurisdictional basis for their appeal because the court below held that Chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 3801 *et seq.* (1982), amending and superseding Title I of the Elementary and Secondary Education Act of 1965, *as amended*, 20 U.S.C. §§ 2701 *et seq.* (1982), is unconstitutional as applied in Missouri. Simply because the main appeal is grounded on a decision invalidating the application of an Act of Congress does not endow the appellees in that appeal with indiscriminate license to thrust upon the Court a potpourri of largely collateral issues through a cross-appeal.

Cross-appellants here challenged the Title I bypass program in Missouri and secured a permanent injunction enjoining it. Their cross-appeal would not in substance modify, enlarge, or enhance the judgment. Accordingly, the cross-appeal should be dismissed or vacated and remanded.

THIS CROSS-APPEAL SHOULD NOT DELAY THE COURT'S DECISION IN *AGUILAR v. FELTON*

Cross-appellants have requested that the appeals and cross-appeal in this case be expedited so that a decision may be forthcoming with the decisions in *School District of the City of Grand Rapids v. Ball*, No. 83-990 (*cert. granted*, Feb. 27, 1984), and *Aguilar v. Felton*, Nos. 84-237, 84-238, and 84-239 (question of jurisdiction postponed to hearing on merits, Oct. 9, 1984). That request is impractical since those cases were argued before this Court on December 5, 1984, and the Court has not yet addressed the statements of jurisdiction filed in this case. Alternatively, cross-appellants request that the Court defer its decision in *Aguilar* and consider that case jointly with this one. *Aguilar* has been briefed and argued, it offers the Court a full record to decide issues that are similar to those in this case,[4] and its disposition may very well obviate the need for this Court to devote further substantial time and resources to this case. In short, there is no substantial reason to defer a decision in *Aguilar* on account of this case.[5]

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[4] The *amicus* brief submitted in *Aguilar* on behalf of G. Hugh Wamble, cross-appellant here, stated (at p. 2) that "[a] decision in this action may well have a direct bearing on plaintiff Wamble's suit in Missouri."

[5] As we have requested in our Jurisdictional Statement in *Ferguson v. Wamble*, No. 84-1343, this case should be held for disposition in light of *Aguilar v. Felton*, and, barring summary affirmance in *Aguilar*, should be remanded to the district court.

CONCLUSION

For the foregoing reasons, this cross-appeal should be dismissed or vacated and remanded.

Respectfully submitted,

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Dated: May 24, 1985